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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE PEOPLE OF THE STATE OF NEW YORK
PETITIONERS

v.

MARK M. MACLAY AND CHARLES E. MCWILLIAMS, RECEIVERS OF MCWILLIAMS BROS., INC., AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Discussion	3
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Brent v. *Bank of Washington*, 10 Pet. 596	5
Carey v. *Keith, Inc.*, 250 N. Y. 216	4
Conard v. *Atlantic Ins. Co.*, 1 Pet. 386	5
New York Terminal Co. v. *Gaus*, 204 N. Y. 512	4
Savings and Loan Society v. *Multnomah County*, 169 U. S. 421	5
Spokane County v. *United States*, 279 U. S. 80	4
Thelusson v. *Smith*, 2 Wheat. 396	5
United States v. *Oklahoma*, 261 U. S. 253	4
Statutes:	
New York Tax Law; Consol. Laws, c. 60:	
Sec. 197	7
Sec. 201	7
Revised Statutes, Sec. 3466 (U. S. C., Title 31, Sec. 191)	7

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OPINIONS BELOW

The opinion of the District Court (R. 32) is not reported. The opinion of the Circuit Court of Appeals (R. 40–45) is reported in 59 F. (2d) 979.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 46.) The petition for certiorari was filed September 17th, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of Section 3466 of the Revised Statutes, a claim for taxes due to the State of New York against an insolvent debtor, takes precedence over the claim of the United States against the debtor for income taxes, when the New York statute provides that the taxes due to New York shall constitute a lien upon the property of the taxpayer.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra,* pp. 7–8).

STATEMENT

The receivers of the insolvent, McWilliams Bros., Inc., requested the District Court for the Southern District of New York to determine the amounts and validity of certain claims of the United States and the State of New York against the insolvent and the respective priorities, if any, of these claims. (R. 12, 14, 17–18.) The parties stipulated the facts applicable to these claims as follows (R. 19, 23):

The receivers were appointed January 10, 1927, pursuant to a court order. (R. 19.) The receivership was made permanent a few days later. (R. 20.) The United States on January 25, 1927, filed claims for replacing a buoy, run into by the debtor and lost (amounting to $516.46 with interest), also for income taxes for a portion of 1917, assessed against the insolvent's predecessor (amounting to

$5,263.24 with interest), and for 1918, assessed against the insolvent (amounting to $28,400.73 with interest). (R. 20–22.) The claim of the State of New York for $3,131.05 with interest, agreed by the United States to be valid as stated (R. 22), was based upon franchise and gross earnings taxes, some of which were due previous to and some of which were due after the appointment of the receivers (R. 15–16).

The District Court set the claims down for hearing on the question of priority (R. 30) and thereafter entered an order awarding priority to the claims of the United States (R. 32). The Circuit Court of Appeals affirmed this order. (R. 46.)

DISCUSSION

Neither the petition nor brief in support contains a statement of reasons for granting the writ or a specification of errors to be relied upon, as required by the rules of this Court.

The State of New York is seeking a review by this Court of a controversy between itself and the United States. In all cases where one of the States of the Union seeks to have litigation between itself and the United States reviewed by this Court we believe that the mere existence of such a controversy presents a question worthy of review in this Court, irrespective of the merits of the State's contentions. For this reason we do not oppose the issuance of a writ in this case, although we believe that the action of both courts below was correct and

in conformity with the decisions of this Court. For the guidance of the Court we are stating briefly our contentions, which are based primarily upon the grounds set forth in the opinion of the court below.

The instant case involves the priority of claims of the United States for unpaid income taxes as opposed to claims by the State of New York for taxes against an insolvent debtor whose assets are not sufficient to pay the claims of both. The claims of New York are based upon unpaid franchise and gross earnings taxes due to it, which the court below held had become general liens against the insolvent's property under Sections 197 and 201 of the New York Tax Law (*infra*, p. 7), as construed by the courts of that State. *New York Terminal Co.* v. *Gavs*, 204 N. Y. 512; *Carey* v. *Keith, Inc.*, 250 N. Y. 216. The contention of the United States is founded upon Section 3466 of the Revised Statutes (*infra*, p. 7), which gives it priority of payment for debts due from an insolvent. Any priority arising in favor of the United States attached at the time the receivers were appointed. *United States* v. *Oklahoma*, 261 U. S. 253, 260.

A similar question was involved in *Spokane County* v. *United States*, 279 U. S. 80, but that case differed from the instant one in that this Court concluded there that none of the parties interested had perfected a lien against the property of the insolvent at the time the receiver was appointed. The contested claims were based on income taxes

due the United States and taxes assessed by two counties of the State of Washington, acting as its agencies. This Court, after considering the view of the State court from which the case came that the State law required affirmative action in order to procure a specific lien on the debtor's property, held that under the circumstances Section 3466 gave the United States priority, but it reserved the question as to what would have been the result had the liens of the State agencies been perfected before the appointment of the receiver.

The court below construed the applicable decisions of this Court to hold that the United States has priority in all cases except where the legal title of the taxpayer had been in some measure divested before the tax or other indebtedness became due. In *Thelusson* v. *Smith,* 2 Wheat. 396, debts due the United States were given precedence over a lien of a judgment creditor who had not levied an execution against the property of the debtor. But a mortgagee's interest was held not to be subject to claims by the United States against the mortgagor. *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386; *Brent* v. *Bank of Washington,* 10 Pet. 596; *Savings Society* v. *Multnomah County,* 169 U. S. 421, 428. The court below was of the opinion, in view of the decisions of this Court, that a mere statutory declaration by a State of a general lien (such as that given by the New York statutes involved here) does not override the broad language of Section 3466 so as to defeat the priority of the United States.

The State of New York contends that its lien arises in the exercise of a sovereign right, never ceded to the Federal Government. But we believe that Article I, Section 8, of the Constitution, providing that Congress shall have power to lay and collect taxes and to make all laws which shall be necessary and proper to carry this and its other powers into execution, as buttressed by Article VI, declaring that laws made in pursuance of the Constitution shall be the supreme law of the land, is sufficient authority to give Section 3466 the effect ascribed to it by the court below.

CONCLUSION

In view of the fact that in this case a State of the Union is claiming priority against the United States and since the decision below affects the taxing power of both sovereigns, we do not oppose the instant petition.

Respectfully submitted.

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OCTOBER, 1932.

APPENDIX

Revised Statutes, Sec. 3466 (U. S. C., Title 31, Sec. 191):

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

New York Tax Law, Consol. Laws, c. 60, provides in part as follows:

> SEC. 197. * * * Each such tax or fee [including those imposed by Sections 182 and 184 of the New York Tax Law] shall be a lien and binding upon the real and personal property of the corporation * * * liable to pay the same until the same is paid in full. * * *
>
> SEC. 201. *Warrant for the collection of taxes.*—After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the tax commission, if an appeal or other proceedings have been taken to re-

view the same, and the undertaking given as provided in this article, the tax commission may issue a warrant under its official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the persons, partnerships, company, association, or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the tax commission and pay to the tax commission the money collected by virtue thereof, by a time to be therein specified, and not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association, or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In case any warrant pursuant hereto is returned unsatisfied, or is not returned satisfied within thirty days after the date when such warrant is made returnable, the tax commission may proceed upon the warrant in all respects, with like effect, and may deputize any assistant, or other officer or other employee of the tax department to so execute the warrant, and shall be entitled to the same fees for services as the sheriff is entitled to charge.

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